(2)

No. 07-36

In the Supreme Court of the United States

MARIO ALFREDO SALINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether references at trial to petitioner's silence after he was arrested but before he received warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), constituted reversible plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 480 F.3d 750.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2007. A petition for rehearing was denied on April 9, 2007 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on July 9, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was

sentenced to 57 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-15a.

1. On April 9, 2003, Officer Erwin Fulcher of the Carrollton, Texas, Police Department stopped a vehicle driven by petitioner because it had a defective taillight. Officer Fulcher instructed petitioner to get out of the vehicle and to hand over his driver's license and proof of insurance. Petitioner handed over his driver's license, but told Officer Fulcher that he did not have proof of insurance because he was in the process of purchasing the vehicle. While Officer Fulcher was running a license check, petitioner attempted to return to his vehicle, whereupon he was stopped by another officer who had arrived on the scene. The officers subsequently arrested petitioner for failure to provide proof of insurance. At the time of the arrest, the officers did not administer any warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. 2a.

Following petitioner's arrest, officers conducted an inventory search of the vehicle and found a 9-millimeter semiautomatic pistol between the driver's seat and the center console; a .357-caliber revolver under the front passenger seat; and more than $3500 in cash. Petitioner was subsequently released. Two days after his arrest, petitioner went to the police station and asked to retrieve his "money and other stuff." The officer at the station explained that the property was evidence and that, in any event, the guns could not be released to petitioner because he was a convicted felon. Petitioner responded, "I know that," and left. Pet. App. 2a-3a.

2. On October 5, 2004, a grand jury in the Northern District of Texas returned a superseding indictment charging petitioner with one count of possessing a fire-

arm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). At trial, the government presented evidence that petitioner was the driver and only occupant of the vehicle; that at least one of the guns was found next to the driver's seat, within petitioner's reach; that petitioner told Officer Fulcher that he was in the process of buying the vehicle; that petitioner later attempted to retrieve all of the property from the vehicle; and that petitioner told the officer at the station that he knew that the guns could not be returned to him. Pet. App. 2a-3a. Rosendo Moreno, a friend of petitioner's, testified in petitioner's defense that he had loaned the vehicle to petitioner after purchasing it and bringing it into an automotive shop where petitioner worked, and that the guns and the cash belonged to him, not petitioner. *Id.* at 3a. On cross-examination, however, Moreno admitted that the guns were not registered to him; that he had no evidence of his ownership; and that he had made no effort to reclaim the cash that was purportedly his. *Id.* at 3a-4a. In addition, on rebuttal, the registered owner of the vehicle testified that he had not sold the vehicle to Moreno, as Moreno had claimed. *Id.* at 4a.

During trial, defense counsel objected on three occasions to comments or questions by the prosecution concerning petitioner's post-arrest silence. First, during opening statements, the prosecutor stated, "At no time, at no time, the evidence is going to show, that the defendant denied ownership of the money or guns." Defense counsel objected, stating, "I'll object going into that, Judge, if it gets into any kind of silence after arrest." The trial judge sustained the objection and told the jury that it was to render its verdict based only on the evidence and not on the arguments of counsel. Pet. App. 5a.

Second, on direct examination during the prosecution's case in chief, the prosecutor asked Officer Fulcher "how, if at all," petitioner had reacted when he heard that guns had been found in the vehicle. Before Officer Fulcher could answer, defense counsel objected; the judge sustained the objection. Pet. App. 5a.

Third, later in direct examination of the same witness, the prosecutor asked Officer Fulcher whether petitioner had made any statements after his arrest. Officer Fulcher answered, "No, sir." Defense counsel objected; the judge sustained the objection. Defense counsel asked the judge to instruct the jury to disregard the statement; the judge stated that he would not instruct the jury then, but would consider an instruction at a later time. Defense counsel apparently did not renew his request for an instruction. In his ultimate instructions to the jury, however, the judge told the jury that it should disregard any question to which the judge had sustained an objection, and further reminded the jury that statements of counsel should not be treated as evidence. Pet. App. 5a-6a.

The jury found petitioner guilty. Petitioner was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-15a. On appeal, petitioner claimed, *inter alia*, that the prosecution had improperly used his post-arrest silence as substantive evidence of guilt, in violation of his Fifth Amendment privilege against self-incrimination. As a preliminary matter, the court of appeals held that petitioner's self-incrimination claim was reviewable only for plain error. *Id.* at 6a-7a. The court of appeals noted that, "[a]lthough [petitioner's counsel] timely objected to each of the prosecutor's references to [petitioner's]

post-arrest silence, the trial court sustained all of those objections, and the trial court's instructions to the jury made it clear that the jury was not to consider any of the challenged remarks." *Id.* at 6a. The court of appeals further noted that "[petitioner's] counsel never took exception to the district court's handling of his objections, and, significantly, [petitioner] never requested that the district court declare a mistrial." *Id.* at 7a. "Thus," the court of appeals reasoned, "[petitioner] effectively received all of the relief that he requested from the district court." *Ibid.* "When a defendant asks this court to reverse a conviction under these circumstances," the court of appeals concluded, "we consider the challenged comments under the plain error standard." *Ibid.*

Applying that standard, the court of appeals then held that the references at trial to petitioner's silence did not constitute plain error. Pet. App. 8a-13a. With regard to the Fifth Amendment privilege against self-incrimination, the court observed that "[n]o published decision of this court has addressed whether the prosecution can, at trial, introduce substantive evidence that the defendant remained silent after he was arrested and taken into custody, but before he was given the *Miranda* warnings." *Id.* at 11a. The court further observed that "there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." *Id.* at 12a. The court of appeals concluded, however, that it "need not decide this constitutional question today" because, even assuming that there was error, petitioner could not establish that any error was plain. *Id.* at 13a. The court explained that "this circuit's law remains unsettled and the other fed-

eral circuits have reached divergent conclusions on this issue." *Ibid.*[1]

4. The court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Pet. App. 16a-17a.

ARGUMENT

Petitioner contends (Pet. 9-17) that the references at trial to his silence after he was arrested but before he received warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), violated his Fifth Amendment privilege against self-incrimination, and that the court of appeals' decision conflicts with decisions of other courts of appeals (and state courts of last resort). Although some courts of appeals have disagreed about whether the government may use a defendant's post-arrest, pre-warnings silence as substantive evidence of guilt, this case would not be an appropriate vehicle for considering that issue. The court of appeals did not decide whether the references to petitioner's silence violated his Fifth Amendment privilege, because it concluded that any error was not plain. Petitioner does not contest the court of appeals' determination that he did not properly preserve his claim of error (and that his claim was reviewable only for plain error). Petitioner also does not

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[1] The court of appeals also rejected petitioner's claim that the references at trial to his post-arrest silence violated his Fifth Amendment right to due process. Pet. App. 8a-10a. The court of appeals noted that, in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), this Court held that the Due Process Clause prohibits the use of a defendant's silence in the wake of *Miranda* warnings to impeach his trial testimony. Pet. App. 10a. The court of appeals concluded, however, that, "irrespective of whether the defendant testifies at trial, the rationale of *Doyle* applies only to post-*Miranda* silence." *Ibid.* Petitioner does not renew his due process claim in the petition. See Pet. 3 n.2.

contend, nor can he show, that, even under the rulings of the courts of appeals on which he relies, the district court committed reversible plain error. Accordingly, this case does not implicate the asserted circuit conflict, and further review is not warranted.

1. a. In *Miranda* v. *Arizona*, *supra*, this Court held that, absent specified warnings, the government generally may not introduce statements taken in custodial interrogation as part of its case in chief. In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), the Court considered a prosecutor's impeachment of the defendant's testimony at trial with the fact that the defendant had remained silent, and failed to provide the same story, after receiving *Miranda* warnings following his arrest. The Court held that the prosecution's use of the defendant's post-warnings silence was "fundamentally unfair and a deprivation of due process." *Id.* at 618. The due process violation arose, the Court explained, because *Miranda* warnings contain implicit assurances that a defendant's exercise of his "right to remain silent" will not carry with it a penalty. *Ibid.*

In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), the Court held that the Fifth Amendment privilege against self-incrimination and the right to due process were not violated when a prosecutor impeached a testifying defendant with his pre-custody, pre-warnings silence. *Id.* at 238-239. The Court concluded that *Doyle* was inapposite because "no governmental action induced [the defendant] to remain silent." *Id.* at 240. In *Fletcher* v. *Weir*, 455 U.S. 603 (1982) (per curiam), the Court applied the same analysis to a due process challenge involving impeachment with post-arrest, pre-warnings silence. The Court explained that, "[i]n the absence of the sort of affirmative assurances embodied in *Miranda*

warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607.

b. This Court's decisions do not address the question whether, consistent with the Fifth Amendment privilege against self-incrimination, the prosecution may present evidence or argument concerning a defendant's post-arrest, pre-warnings silence as part of its case in chief. The courts of appeals to have addressed the issue have reached varying conclusions. Three circuits have held that the admission of evidence of such silence does not violate the Constitution. See *United States* v. *Frazier*, 408 F.3d 1102, 1109-1111 (8th Cir. 2005), cert. denied, 546 U.S. 1151 (2006); *United States* v. *Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991); *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986). Three other circuits, however, have held that the admission of evidence of such silence, as substantive evidence of guilt, violates the Fifth Amendment privilege against self-incrimination. See *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1028-1030 (9th Cir. 2001) (en banc); *United States* v. *Moore*, 104 F.3d 377, 384-389 (D.C. Cir. 1997); *United States* v. *Hernandez*, 948 F.2d 316, 322-324 (7th Cir. 1992).[2] In two of those cases, the courts of appeals ultimately concluded that any error was harmless, see *Moore*, 104 F.3d at 389-390; *Hernandez*, 948 F.2d at 324-325; in the other,

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[2] Three other circuits have held that evidence of a defendant's *pre-arrest* silence may not be admitted as substantive evidence of guilt. See *Combs* v. *Coyle*, 205 F.3d 269, 283 (6th Cir.), cert. denied, 531 U.S. 1035 (2000); *United States* v. *Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *Coppola* v. *Powell*, 878 F.2d 1562, 1567-1568 (1st Cir.), cert. denied, 493 U.S. 969 (1989).

the court of appeals determined that the error was not harmless, because the government "used the testimony about [defendant's] silence as its principal means of meeting its burden on the critical element of knowledge" and the remaining evidence was "not so strong," *Velarde-Gomez*, 269 F.3d at 1035.[3]

2. This case would not be an appropriate vehicle for resolving the disagreement in the courts of appeals about whether the government may introduce evidence of a defendant's post-arrest, pre-warnings silence in its case in chief.

a. As a preliminary matter, the court of appeals in this case did not decide whether the references to petitioner's silence violated his Fifth Amendment privilege against self-incrimination. See Pet. App. 13a (concluding that the court "need not decide th[at] constitutional question today"). That is because it found that petitioner had failed sufficiently to preserve any challenge to those references. The court explained that the trial judge had sustained defense counsel's objections to the reference and that defense counsel "never took exception to the district court's handling of his objections." *Id.* at 7a. As a result, petitioner's claim—unlike the claims of the defendants in most of the cases he cites—is

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[3] Petitioner correctly notes (Pet. 13-14) that state courts have also not reached consistent results on the admissibility of post-arrest, pre-warnings silence. In many of the cases on which petitioner relies, however, the courts either relied on state constitutional provisions or evidentiary rules or found any federal constitutional error to be harmless. See, *e.g.*, *People* v. *Quintana*, 665 P.2d 605, 609-610 (Colo. 1983) (evidence was not relevant under state evidentiary rule); *State* v. *Graves*, 27 S.W.3d 806, 811-812 (Mo. Ct. App. 2000) (admission of evidence was harmless); *Commonwealth* v. *Turner*, 454 A.2d 537, 538-540 (Pa. 1982) (state constitution prohibits admission of evidence even for impeachment).

reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993).[4]

Under the plain-error standard, petitioner would be entitled to relief only if he could show that (1) there was error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). The court of appeals concluded that, under the second prong of the plain-error standard, petitioner could not establish that any error was plain, because the court of appeals' law on the issue is unsettled and other courts of appeals had reached different conclusions—and, as a result, the court did not decide whether there was constitutional error in the first place. See Pet. App. 13a. This Court does not ordinarily consider questions not passed upon by the court below, see, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957), and petitioner offers no reason for deviating from that practice here.

b. Petitioner does not contest the court of appeals' determination that his claim was reviewable only for plain error. Instead, he contends only that the court of appeals erred by concluding that, under the second prong of the plain-error standard, any error was plain,

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[4] In *Frazier*, the admission of evidence of the defendant's post-arrest silence was likewise reviewed only for plain error because the defendant failed to object to the prosecutor's line of questioning. 408 F.3d at 1111. The defendant thereafter filed a petition for a writ of certiorari raising a similar question to the question presented here (and alleging the same circuit conflict). This Court denied the petition. 546 U.S. 1151 (2006) (No. 05-7207).

reasoning that "the Fifth Circuit already has squarely decided that prosecutorial comment at trial on a defendant's post-arrest, pre-*Miranda* silence is impermissible." Pet. 15. The case petitioner cites for that proposition, however, is inapposite. In *United States* v. *Impson*, 531 F.2d 274 (1976), the Fifth Circuit held that a prosecutor had improperly elicited testimony from an officer that a defendant was silent after he was arrested (but before he received *Miranda* warnings). *Id.* at 278-279. That holding, however, appears to have rested on evidentiary, not constitutional, grounds. See *id.* at 279 (noting that the defendant's silence "lacked significant probative value and under these circumstances any reference to his silence carried with it an intolerably prejudicial impact"). *Impson*, moreover, predated this Court's decisions in *Jenkins* and *Fletcher*, and the Fifth Circuit declined to follow it in a subsequent case on the ground that it "refused to recognize the difference" between pre- and post-*Miranda* silence. *United States* v. *Musquiz*, 45 F.3d 927, 930-931 (5th Cir.), cert. denied, 516 U.S. 808 (1995).[5]

Notably, the parties fully briefed the issue of the precedential value of *Impson* before the court of appeals, see Gov't C.A. Br. 12 n.3; Pet. C.A. Reply Br. 5-7, 10-11, and that court evidently concluded that *Impson* did not decide the question presented here. To the extent that petitioner contends otherwise, this Court should defer to the court of appeals' interpretation of its

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[5] The other Fifth Circuit case on which petitioner relies (Pet. 10-11, 16), *United States* v. *Edwards*, 576 F.2d 1152 (1978), is distinguishable for similar reasons as *Impson*, and for an additional reason: *viz.*, because the prosecutor not only commented on the defendant's silence at the time of arrest, but also arguably commented on his decision not to testify at trial. See *id.* at 1155.

own precedent. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) (noting that this Court does not sit to resolve intracircuit conflicts).

c. Even if petitioner could show that the court of appeals erred by concluding that, under the second prong of the plain-error standard, any error was plain, this case would not be an appropriate vehicle for review of the underlying question whether there was error in the first place, because petitioner does not contend, and in any event cannot show, that any error either affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson*, 520 U.S. at 466-467. In this case, the government presented "overwhelming" and "essentially uncontroverted" evidence of petitioner's guilt. *United States* v. *Cotton*, 535 U.S. 625, 633 (2002); see, *e.g.*, *United States* v. *Wiley*, 29 F.3d 345, 349 (8th Cir.) (declining to reverse based on repeated references to the defendant's post-warnings silence, on the ground that "the government's evidence was overwhelming"), cert. denied, 513 U.S. 1005 (1994). Specifically, the government's evidence showed that petitioner was the driver and only occupant of the vehicle; that at least one of the guns was found next to the driver's seat, within petitioner's reach; that petitioner told one of the arresting officers that he was in the process of buying the vehicle; that petitioner later attempted to claim all of the property from the vehicle; and that petitioner told the officer at the station that he knew that the guns could not be returned to him. Pet. App. 2a-3a. The court of appeals noted in rejecting petitioner's challenge to the sufficiency of the evidence that the government's evidence "was easily sufficient for a jury to conclude that the government satisfied its burden of proof," *id.* at 14a, and, in

fact, the evidence cleared a much higher threshold as well.

In addition, petitioner cannot establish that he suffered any prejudice from the references at trial to his post-arrest, pre-warnings silence, because the trial judge took sufficient curative action to prevent the jury from considering evidence of that silence as substantive evidence of guilt. On each occasion, the trial judge sustained an objection either to a question that would have solicited a response concerning petitioner's silence, or to a statement by the prosecutor concerning that silence. See Pet. App. 5a-6a. The trial judge also instructed the jury that it should disregard any question to which the judge had sustained an objection and that statements of counsel should not be treated as evidence. See *ibid.*

Accordingly, even if the admission of evidence of a defendant's post-arrest, pre-warnings silence would ordinarily violate the defendant's Fifth Amendment privilege, no error occurred here, because jurors are presumed to follow their instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). At a minimum, the trial judge's curative actions suggest that any prejudice that petitioner suffered from the references to his silence was slight—and that any error was thus harmless. See, *e.g.*, *United States* v. *One Star*, 465 F.3d 828, 832-833 (8th Cir. 2006) (holding that admission of evidence of the defendant's post-warnings silence was harmless in light of, *inter alia*, "the district court's quick sua sponte cautionary response"). Even under the rule of the courts of appeals on which he relies, therefore, petitioner cannot show that the district court committed reversible plain error. Because the court of appeals did not decide whether there was error in this case, and because petitioner could not benefit from a holding that it is error to

admit evidence concerning a defendant's post-arrest, pre-warnings silence, review of that question in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2007